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THE MASSACHUSETTS TRUST AS A SUBSTITUTE FOR INCORPORATION.

The charlatan who wishes to sell you an article "just as good" as the one you have asked for is no worse than the great number of "business service companies" who are today seeking to induce merchants to organize their business under the "Massachusetts Trust Plan" as being "just as good" as a corporation and much cheaper.

We have received several different circulars advertising very garishly this new form of business organization and making all sorts of ridiculous and exaggerated statements concerning it. One advertisement reads: "Do Not Organize Your Company Under the Statutes; Organize it Under the Common Law." Throughout this circular the writer speaks with assurance about something that has never had any existence except in his own befuddled brain—the so-called common law company. There is "no such animal." Other circulars urge the business man to "get his business under the protection of the common law" where unfriendly legislation, he is assured, will not affect him. What a silly statement! Yet some business men "bite." These "business service companies," or by what other name they may be termed, are operating in many commercial centers all over the country and are deluding hundreds of otherwise hard-headed business men, who ought to know better than to trust their business future to those who have no knowledge of the law. One of the circulars before us even goes so far as to warn the business man "not to consult" his attorney since lawyers "are opposed to this new form of organization." They argue that this form of organization is so cheap

and easy to operate as "to make a lawyer's advice absolutely unnecessary."

No doubt there is some merit in the so-called Massachusetts Trust idea of business organization, but that it creates any new form of business organization hitherto not available to lawyers is clearly a mistake. It had its origin in its present form in Massachusetts probably for the reason that, formerly, corporations could not be formed in that state to hold and manage real estate. The desire of those who first organized such trusts was to form an association for the administration of real estate or large public interests which demanded good management rather than business initiative. Possibly other motives have since intervened to make the "Massachusetts Trust" form of business organization desirable in some cases, such as to hold the property and stock of another corporation, or to form a subsidiary organization to avoid the stringent foreign corporation laws of some states, or to reduce the rate of income tax assessments. But just how far it would be advisable for any particular business to organize under the trust form of organization is a question which should be referred to the careful consideration of competent counsel.

It is ridiculous to call these so-called "Massachusetts Trusts" common law companies. There never was but one common law company—the partnership. All other forms of business organization depended on a special franchise from the king or parliament. The corporation, which is the lineal descendent of the "crown chartered companies," is the only other form of business organization known to the law. There is no intermediate form. (See *Ricker v. American Loan & Trust Co.*, 140 Mass. 346.)

The "trust" is one of the administrative agencies of a court of equity. Whether it developed from the effort of the chancellor

to save some of the old uses from the strict terms of the Statute of Uses or whether it can trace its pedigree back to the ancient and respectable *fidei commissa* of the civil law, the fact remains that it is a very ancient and important institution of equity. Lawyers are familiar with its operations and the purposes for which it may be created are almost infinite in variety. The fact that it should be used for business purposes is not remarkable. The only new thing about the Massachusetts Trust is its provision for transferable certificates of interest to the *cestuis que trust*. There is in some cases, it is true, a needless attempt to release certificate holders from personal liability. The *cestuis que trust* was never personally liable for acts of the trustee. The effort, however, to release the trustees themselves from personal liability as to third persons is futile; except as that may be done by express or implied stipulations to such effect in contracts made with third persons. No agreement between the creators of the trust and the trustees can change the latter's liability as to third persons. So, in reality, the only innovation in the Massachusetts Trust is that of fixed, transferable interests in the trust fund.

A Massachusetts Trust, therefore, is not a common law company, nor some new hybrid form of business organization; it is nothing but a simple trust applied to the management of a business. The contract creating the trust fixes the terms upon which the trust property shall be administered. There has never been any limitation on the right of the creator of a trust to fix the limitations upon the powers of the trustee. In order to avoid the Statute of Uses, some active duties must be conferred upon the trustee, but how far the trustee may be permitted to go in investing, managing and distributing the trust property, is, so far as the purposes of the trust are not illegal, practically without limit. Of

course the settlor cannot escape the operation of the Rule against Perpetuities, and such a trust is therefore limited to a life or lives in being and twenty-one years, or arbitrarily fixed at twenty-one years.

The settlors of the trust, however, may not only fix the powers of the trustee *ad libitum*, but they may by contract with each other define their own rights in any way they please. In this respect their relation to each other is purely contractual. When attorneys and judges get over their confusion of mind induced by the first appearance of the so-called Massachusetts Trust, they will see in it two well known legal relationships. The trust relation itself defining the duties and liabilities of the trustee is one relationship; the other is a contract relation based on a collateral agreement among the settlors themselves, which defines their rights as *cestuis que trust inter sese*.

The Massachusetts Trust is therefore not a corporation nor is it a partnership unless the contract between the settlors can be construed as such, and even then, if the trust is bona fide, it would be only a partnership in the proceeds or distributive income of the trust. It is really a trust engaged in business. As the trust was devised to administer estates and funds in equity it is still questionable how far equity will be willing to go to permit its adaptation to business. Can equity be persuaded to make more elastic the rules governing the discretion of trustees? This will be essential to the proper handling of any business that demands prompt and important decisions and involves hazard or risk. It is quite reasonable to assume that if attorneys have no definite end to accomplish, an ordinary business venture will be hindered in its advancement by the trust form of organization. The trustees of such a trust, since they are not immune from personal liability, will be slower to make decisions

or take chances than the directors of a corporation.

Anyone acquainted with the law governing the administration of a trust would hesitate to embark under such a form of organization where the new enterprise requires initiative and energy. There is also likely to be some hesitation on the part of third persons to have any contract relations with a "trust" organization, unless the transaction can be said to be perfectly fair. The trust in business is for most ordinary purposes out of its elements. Its exotic nature will cause those relying upon it to take precautions that would be wholly unnecessary in the case of a corporation.

NOTES OF IMPORTANT DECISIONS.

INFRINGING THE COLOR SCHEME OF ONE'S COMPETITOR AS CONSTITUTING UNFAIR COMPETITION.—In no branch of law are the courts required to make finer distinctions than in that of unfair competition, especially in view of the great value and variety of trade-marks based on the peculiar character or form of package or receptacle. In the recent case, however, of *A. G. Morse Co. v. Walter M. Lowney Co.*, 256 Fed. 935, the U. S. District Court for the Northern District of Illinois draws the line at providing any monopoly in the use of a simple color scheme, the court saying, "In this circuit no one has a monopoly of form, color or of the shape of letters." While we regard that statement as a little too broad for universal application, as the court may find later in applying the rule to subsequent cases coming before it, we believe the decision in this particular case to be an accurate application of the rule of unfair competition.

In this case the plaintiff charged the defendant with putting up milk chocolates in a box with the same shade of ribbon as that used by the plaintiff. In other respects, however, the plaintiff's box was distinguished from plaintiff's box by its own registered trade name, which was at least as well known to

the public, by long advertising, as was that of the plaintiff. The gist of the action of unfair competition is the element of "palming off." That is, did the action of defendant in copying the box used by the plaintiff enable the defendant to palm off his goods as those of his competitor? It is hard to believe that color alone, even of a ribbon or of a box, would take such a distinct hold on the public mind as to identify such ribbon or color of box with goods of a particular manufacturer. There must be something besides the color scheme, which gives the package a distinctive form or makes a clear impression on the public mind. These distinctive characteristics are called trade names or trade marks, and have been and should be carefully protected by the courts. In the principal case the court gave the following explanation of the distinction to be observed in this class of cases:

"The complainant has no exclusive right to the red color, nor to the size and shape of the packages, nor to the use of gilt letters on them. These things are undeniably open to the trade." (*American Tobacco Co. v. Globe Tobacco Co.*, C. C., 193 Fed. 1015, at p. 1017; *Diamond Match Co. v. Saginaw Match Co.*, 142 Fed. 727, 74 C. C. A., 59).

"Every candy dealer having the right to put up his product in red boxes, the casual purchaser of intelligence could not be misled into believing that the defendant's goods were those of the complainant. Of course, an unscrupulous dealer could show a red box to a purchaser and say that it was Morse's, wrap it up in a piece of paper, take the money, and send the purchaser home; but the moment the wrapping paper was removed the purchaser must discover the mistake and the dealer suffer for the deception.

"The defendant is not responsible for the fact that tricky retailers represent its manufacture as that of complainant, knowing better, provided defendant has done its legal duty in distinguishing its own product from that of complainant" (*Rathbone v. Champion Co.*, 189 Fed. 26, 110 C. C. A., 596, 37 L. R. A., N. S., 258; *Schlitz Brewing Co. v. Huston Co.*, 241 Fed., 817, 154 C. C. A. 519).

"The law will not permit a manufacturer to put in the hands of an unscrupulous dealer goods that may be palmed off upon the purchaser as having been made by a competitor; but this presupposes that the similarity of the packages, cartons, cans, or boxes is such that the casual purchaser would be easily confused. Wherever the markings are such that the manufacturer must be known, there is no unfair competition."

MILITARY SERVICE AND CONTRACTS OF EMPLOYMENT.

We lately discussed here the question of impossibility of performance of contract as affected by war conditions. The contract of service is subject to the same rules, and applying to it the principles arrived at we may define the position as being, that in the contract there is implied a term or condition whereby, on the happening of some event which renders its performance impossible or otherwise frustrates the objects and intentions of the parties, the contract is held to be determined. For example, temporary absence may be such as to involve suspension of the contract only, or the absence may be so prolonged as to amount to a frustration of the purpose of the contract which is accordingly determined.

The broad question is whether service with the forces operated as an absolute termination of the then existing contract of service with the consequent cesser of the employe's right to claim payment of wages and other emoluments. If the contract is not determined presumably the employer's liability to pay wages continues, and the employe must be regarded as having leave of absence for as long a period as may be necessary to enable him to serve with the forces for the purposes of war.

In the first case on the subject,¹ a British ship during a voyage for which a British seaman had signed articles, being in a German port at the outbreak of war, was detained and the crew were afterwards imprisoned. Before either ship or prisoners were released an action for allotment of wages was commenced, and it was held that

the seaman ceased to be entitled to his wages as soon as further performance of the contract became impossible which the majority of the court held to be from the date of detention of the ship.

In *Marshall v. Glenville*² the plaintiff was employed by the defendants as a traveler on commission under agreement in writing which provided for a six months' notice to be given on either side for the termination of the agreement. On the passing of the Military Service Act, 1916, the plaintiff became liable to military service and although he was, on the defendant's application, exempted until 16th July, in that year he joined the Royal Flying Corps four days previous to the expiration of his exemption. It was held that the agreement was subject to the implied term that it should cease to be binding if future performance became unlawful, and that performance having been unlawful by virtue of the Military Service Act in July, 1916, the agreement was *ipso facto* finally determined and not merely suspended. Rowlatt, J., in his judgment stated that the effect of the Military Service Act, 1916, was to take the plaintiff out of the employment of the defendants, that he could no longer execute their orders, and they could no longer employ him; and that for the then present and the indefinite future he was out of their employment. McCardie, J., also expressed the opinion that the effect of the man's enlistment or of the Military Service Act was to sweep away the basis of the arrangements between the parties and that there was such a failure of the presumed basis of the continuation of the contract of service as to put an end to the same having regard in particular to the prolonged inability of the employe to perform his obligations.

(1) *Horlock v. Beall Co.*, S. J. 236.

(2) 1917, 2 K. B. 87.

In *Joyce v. Ebury*³ an employee was a contributor to a provident fund founded by his employers and by one of the rules of the fund certain payments were to be made to the widow of any contributor in the case of his death, but no person leaving the employer's service of his own account would have any claim upon the fund. In the outbreak of war the employers stated that persons enlisting would on completion of their military service, be re-employed. The employee in question having applied for and obtained leave to join His Majesty's Forces enlisted and was subsequently killed in action. His widow claimed payment of the amount due under the rules of the fund, but it was held that the deceased had left his employment of his own accord within the meaning of the rules in question and that accordingly his widow was not entitled to payment out of the fund.

The question was also raised in *Stretch v. Scout Motor Co. Ltd.*,⁴ where it was held that the voluntary enlistment of a workman as a war munitions volunteer under the Munitions of War Act, 1915, followed by transference from his then employment to a distant controlled establishment terminated his contract of service.

It will be seen that in all the above cases the finding of the court was adverse to the claim of the employee but the contrary was the result in the most recent case on the point.⁵ The facts in that case were that a testator had given a legacy of shares in a company to each of his three sons who should, prior to attaining the age of twenty, enter the employ of a certain company, and remain therein until attaining thirty-three. In 1913 one of the sons, before attaining the age of twenty, entered the company's

employ but in September, 1914, with the consent of the directors he voluntarily joined His Majesty's Forces. The trustees of the will took out a summons for the determination of the question whether the son had remained in the employment of the company within the meaning of the will notwithstanding his service with the Forces since September, 1914. In support of the son's interest it was argued that there had been no cesser of his employment by the company and reference was made to *Herbert v. Reid*,⁶ dealing with the case of a legacy to a servant who, at the date of the testator's death, was not rendering actual service but whose contract of service it was held had not, according to the intention of the parties in the special circumstances of the case, been determined. On the other side counsel for the residuary legatees quoted *Stretch v. Scout Motor Co. Ltd.*,⁷ but apparently none of the other cases above referred to were brought before the notice of the court. Sargent J., considered that it was clear that the intention of the parties was that the employment should continue during the son's absence with the Forces with a temporary dispensation of obligation to render services otherwise due: and that upon the authority of *Herbert v. Reid*, the contract had not been determined.

It will be observed that this last case did not involve a straight issue between employer and employee. In fact the employers were not parties to the proceedings. So far as the other cases are concerned they certainly seem to interpret the law adversely to the employee: at all events in cases where the employer stands on the strict obligation to the contract.

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Glasgow, Scotland.

(3) 1917, W. N. 51.

(4) 62 S. J. 651.

(5) *Re Cole*, 1919, 1 Ch. 218.

(6) 1810, 16 Ves. 481.

(7) *Supra*.

IS THE LAW IN REFERENCE TO THE REMOVAL OF A CIVIL CASE FROM A STATE COURT TO THE UNITED STATES COURT IN A CHAOTIC CONDITION?

In a recent issue of the Central Law Journal,¹ the conclusion is reached in an article entitled "Removal of Causes from State Courts to United States Courts—A Picture of Chaos Demanding a Remedy," that the decision in *Ex parte Wisner*² and in other decisions,³ have so qualified and discredited the *Wisner* case and left the decisions in such a muddled state that legislation is desirable to clarify the law, and this question is now before the American Bar Association with that end in view. This question is of unusual importance at the present time, as suits involving damages amounting to millions of dollars will be determined by its decision.

In the report to the Association by the committee to suggest remedies and propose laws relating to procedure, it is said⁴ that the three points requiring careful consideration are (1) The effect of the doctrine in *Smith vs. Lyon*, 133 Wis. 319. (This is a mistake in citation, as there is not such a case in the volume cited.) (2) The effect of the decision in *Shaw vs. Quincy Mining Co.*,⁵ and (3) the effect of the decision in *Ex parte Wisner*.⁶

The question involved is not so much whether mandamus is the proper remedy to remand, although that was the point at issue in all of the removal cases, but whether the United States courts have jurisdiction in the question under discussion, and this latter point is the storm centre in *Ex parte Wisner*, as removal cannot be had

if the United States courts cannot take jurisdiction.

Mr. Chas. A. Boston, in the article above quoted, on pages 246-247, sets forth thirty-two different classifications of principles in which there have been conflicting decisions, of which twelve are in cases in the Supreme Court of the United States, all of which later involved the decisions in *Ex parte Wisner*, *In re Moore* and *Ex parte Harding*, except two, one of which was decided before the law of removals was changed in 1888, *Barney vs. Latham*,⁷ and the other in which Justices Field and Brewer disagreed where on circuit in successive suits. On pages 249-251, he makes seventeen different classifications in which conflicts have arisen, one of which was in the Supreme Court, viz., the modification of *Ex parte Wisner* by *In re Moore*, which is explained below.

It will thus be seen that outside of the disagreement in the District Courts, the whole controversy arises out of the decisions in what Mr. Boston terms the "(mis)leading *Wisner* case" and in the *Moore* and *Harding* cases.

It is not profitable to discuss the decisions in the District Courts, which are hopelessly at variance, and are not the last word on the subject, and analyzing the decisions of the Supreme Court of the United States, the writer contends that the claim made in the article quoted that the decisions of the highest court are not clear and have created chaos in the practice in such cases is not warranted. In order to correct misunderstandings, the Supreme Court in *Ex parte Harding* discussed every leading case on the subject in recent years in detail, giving a statement of the facts and the principles of law involved, and explained apparent contradictions. It is apparent that it is impossible to state the practice to cover every case which may hereafter arise, but sufficient has been said in the fifteen pages of the opinion to make clear what was in-

(1) Vol. 88, p. 248, by Mr. Chas. A. Boston of New York City.

(2) 203 U. S. 449.

(3) Including *In re Moore*, 209 U. S. 491; *In re Winn*, 213 U. S. 458, and *Ex parte Harding*, 219 U. S. 363.

(4) American Bar Association Journal for July, 1919, Vol. 5, No. 3, page 459.

(5) 145 U. S. 444.

(6) *Supra*.

(7) 103 U. S. 205.

tended to be held in *Ex parte Wisner* and the cases following it, which seemed to be contradictory.

In discussing this question we want to know has the United States Court jurisdiction when a suit is brought in the court of a state in which one of the parties is doing business and in which neither of the parties reside, and it is desired to remove, and what is the proper practice to compel the United States Court to remand?

Ex parte Wisner held that an action commenced in a state court by a citizen of another state against a non-resident defendant who is a citizen of a state other than that of the plaintiff cannot be removed by a defendant into the Circuit (District) Court of the United States on the ground that as none of the U. S. Courts would have jurisdiction, it could not be conferred upon any particular District Court by waiver, and that mandamus was the proper remedy. The *Wisner* case had been misunderstood to mean that *mandamus was the proper remedy in any case* where the District Court refused to remand, and this misapprehension was corrected by the Supreme Court in *Ex parte Harding*, as will be shown below, and which has given rise to the impression set forth in the article quoted that the *Wisner* case was discredited, and that it is "a solitary monument with all of its props removed, wavering in the wind, a mere phantom, as it were, but of sufficient substance nevertheless to make uniformity impossible so long as reason and not authority controls in judicial decision,"⁸ while the fact is nothing was said in the *Harding* case, nor in any other decision in the Supreme Court denying the correctness of this decision in the *Wisner* case as set forth above.

It will be seen that the crux of the whole matter is whether the U. S. Courts have jurisdiction, and if the *Wisner* case is the law on that point and has never been criticised on that point, we know from it that

the U. S. Court cannot have jurisdiction in the question under discussion.

But the Supreme Court has said that it was its duty to disapprove and qualify *Ex parte Wisner*, *In re Moore* and *In re Winn*,⁹ and therefore to understand what this disapproval means it becomes necessary to find out in what the qualification consists.

In *re Wisner* followed the principle decided in *Virginia vs. Rives*,¹⁰ and *Virginia vs. Paul*,¹¹ without citing them, in which cases it was held that a rule to show cause why a mandamus should not issue to compel the District Court to remand a case would be made absolute and jurisdiction was taken because there was "*extraordinary abuse of discretion disclosed by the power attempted to be exerted*, the confusion and disregard of constitutional limitations which the asserted power implied, and because, under the law as it then stood, no power otherwise existed to correct the wrongful assumption of jurisdiction by the Circuit Court,"¹² and this principle was stated in the *Moore* case without citing the *Rives* or *Paul* cases.

About the same time the Supreme Court decided¹³ that a mandamus would be refused in cases where there was no extraordinary abuse of discretion and in which the Act of 1875 expressly gave an appeal to or a writ of error from the Supreme Court for the review of the Circuit (District) Court remanding causes, and this rule was followed in *In re James Pollitz*,¹⁴ *Ex parte Nebraska*,¹⁵ *Ex parte Gruetter*,¹⁶ and thus we see that there were two lines of cases, the one following *Ex parte Hoard*, which is the general rule of practice, and the other following *Virginia vs. Rives*, which was the exceptional rule, and determining whether mandamus was not or was the proper remedy.

(9) *Ex parte Harding*, 219 U. S. 363, 379.

(10) 100 U. S. 313.

(11) 148 U. S. 107.

(12) *Ex parte Harding*, 219 U. S. 363, 373.

(13) *Ex parte Hoard*, 105 U. S. 578.

(14) 206 U. S. 323.

(15) 209 U. S. 436.

(16) 217 U. S. 586.

(8) Cent. L. J., Vol. 88, p. 249.

Disapproval of the Wisner case was stated in *In re Moore*¹⁷ on the ground that it had held that jurisdiction of a case could not be obtained where neither of the parties was a resident of the district, *even with the consent of the parties*, there being diversity of citizenship which gave some U. S. Court jurisdiction, and in the *Moore* case at page 460 it was said "nothing in the opinion in the Wisner case is to be regarded as changing the rule as to the effect of a waiver in respect to the particular court," and Chief Justice Fuller wrote the opinion in both cases. As waiver had taken place in the *Moore* case, and the United States Courts had jurisdiction, which they did not have in the Wisner case, the Supreme Court refused to grant a mandamus, and held that jurisdiction in a particular district could be given by consent where some U. S. Court could take jurisdiction of the subject matter, but not otherwise.

In *re Winn*¹⁸ followed *Ex parte Wisner*, as modified in *re Moore*, and after setting forth the ground of disapproval as above stated, the Court, at page 469, said that the "Wisner case was otherwise untouched," and took jurisdiction to review a refusal to remand as the cause of action did not arise under the Constitution and laws of the United States, and the *United States Courts were without jurisdiction*, which was the ground of the decision in the Wisner case.

In *re Pollitz*¹⁹ followed the decision in *Ex parte Hoard*,²⁰ and in commenting on *Ex parte Wisner*, the court said that in the Wisner case, on the face of the record there was lack of jurisdiction in the United States courts involving no element of discretion, and *Virginia vs. Paul*²¹ was cited as the basis of the decision.

From this examination we see that *Ex parte Wisner* has been criticised upon one

point, namely: whether mandamus is the proper remedy, but not upon the doctrine that the United States courts were without jurisdiction in the case stated, and if the decisions before it were consistent, the practice is not beclouded by it. However, as the District Courts had been misconstruing the Wisner case, the Supreme Court in *Ex parte Harding*²² announced that there never was thought to be any conflict between *Virginia vs. Rives*,²³ and *Virginia vs. Paul and Ex parte Hoard*, which were decided almost contemporaneously, and that *Ex parte Nebraska*,²⁴ which followed *In re Pollitz*,²⁵ and *In re Moore*, which qualified *Ex parte Wisner*, had been announced on the same day. The court sums up the matter by saying that the "Conflict presented has arisen *not because of the announcement in any of the cases of any mistaken doctrine as to jurisdiction*, or of any wrongful decision of any of the cases upon the merits, but has simply been occasioned, beginning with *Ex parte Wisner* from applying the exceptional rule announced in *Virginia vs. Rives*, to cases not governed by such exceptional rule, but which fell under the general principle laid down in *Ex parte Hoard*, and the line of cases which have followed it. Under these circumstances it becomes our plain duty, while not questioning the general doctrine in any of the cases, yet to disapprove and qualify *Ex parte Wisner*, *In re Moore* and *In re Winn* to the extent that those cases applied the exceptional rule of *Virginia vs. Rives* and thereby obscured the broad distinction between the general doctrine announced in *Ex parte Hoard* and the cases which followed it, and the exception established by *Virginia vs. Rives*."

In other words, the *Harding* case makes it clear that the general rule is that writ of error or appeal is the remedy to compel the District Court to remand, and that mandamus will be granted only in the exceptional cases which are governed by the

(17) 209 U. S. 491.

(18) 213 U. S. 458.

(19) *Supra*.

(20) *Supra*.

(21) *Supra*.

(22) 219 U. S. 363.

(23) 100 U. S. 313.

(24) 209 U. S. 436.

(25) 206 U. S. 323.

exceptional rule which is illustrated in the cases following *Virginia vs. Rives*, and that *Ex parte Wisner*, *In re Moore* and *In re Winn* followed an exception without stating it to be such, which rendered it necessary for the Supreme Court to disapprove, and that the other rules laid down by *Ex parte Wisner* were correct, which carefully makes clear that the fundamental props of the *Wisner* case are still in place.

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BREAD—REGULATION OF SALE.

ALLION v. CITY OF TOLEDO.

Supreme Court of Ohio. April 15, 1919.

124 N. E. 237.

(Syllabus by the Court.)

A city ordinance, fixing standard sizes of bread loaves and prescribing loaves of one pound avoirdupois as the minimum weight that may be manufactured and sold by a baker, is not an unreasonable or arbitrary exercise of police power, and is constitutionally valid.

Nichols, C. J., and Donahue and Robinson, JJ., dissenting.

Error to Court of Appeals, Lucas county.

Clara Allion was convicted in the police court of Toledo of selling a loaf of bread, weighing less than the weight fixed by ordinance. The conviction was reversed by the court of common pleas, and its judgment was reversed by the Court of Appeals, and the judgment of conviction was affirmed, and defendant brings error. Affirmed.

Plaintiff in error, Clara Allion, being engaged in the bakery business in the city of Toledo, Ohio, was charged in the police court and there convicted of selling a loaf of bread weighing less than one pound avoirdupois weight in violation of a city ordinance regulating the size of loaves of bread to be sold within the city of Toledo. The ordinance provided:

"That every loaf of bread made or procured for the purpose of sale, sold, offered or exposed for sale within the city of Toledo shall weigh a pound avoirdupois (except as hereinafter pro-

vided) and such loaf shall be considered the standard loaf in the city of Toledo. Bread may also be made or exposed for sale in one pound, one and one-half pound, two pound, two and one-half pound, three pound, and three and one-half pound, four pound, four and one-half pound, five pound, five and one-half pound or six pound loaves and in no other way. * * * That if any person, firm or corporation shall make or procure for the purpose of sale, sell, offer or expose for sale within the city of Toledo any bread which contains a deleterious substance or material, any bread the loaf or loaves of which are not standard pound, pound and one-half, two pound, two and one-half pound, one and one-half pound, two pound, two four pound, four and one-half pound, five pound, five and one-half pound or six pound loaf, as defined in section 2 hereof, or any bread which is not made in a clean and sanitary place; or shall make or procure for the purpose of sale, sell, offer or expose for sale, within the city of Toledo, any standard loaf or loaves of bread which do not weigh one pound each, or any bread the loaf or loaves of which do not weigh as much as the weight mark on the label thereon, or any bread or loaf or loaves of which do not have affixed thereon the label marked, as provided in section 2, such person, firm or corporation, shall be fined not less than \$10.00 nor more than \$100.00 for each offense."

JONES, J. It is contended on behalf of the plaintiff in error that the city ordinance contravenes section 1, article 1, of the Ohio Constitution, and section 1, article 14 of the Amendments to the federal Constitution. The fundamental guarantees of these two sections protect the right of private contract and the freedom of engagement in lawful business. However, there are various callings, though lawful and useful, which are subject to surveillance of and regulation by the state in the interest of the health, safety, or welfare of the community. That bakeries may be so regulated, and the state's police power invoked for that purpose, is not open to question. This right of regulation is now generally conceded in both state and federal jurisdictions. Therefore the only question remaining, and the one here urged, is that the city council of Toledo, in the passage of this ordinance, clearly abused its power, and that its action was a palpable and unwarranted interference with the business of plaintiff in error.

The record discloses that the plaintiff in error at the time of the accusation, daily baked and sold 5 large loaves of 21½ ounces each, and 70 loaves, each weighing from 11 to 11¾ ounces. The minimum standard loaf prescribed by the ordinance was one pound avoirdupois. The proof discloses the sale of a loaf weighing 11¾ ounces. The amount of deficiency therefore between the standard used by the baker, and that adopted by the city

council ranged from $4\frac{1}{4}$ to 5 ounces. While Toledo is a large city, the record does not disclose any demand for bread loaves smaller than the minimum legal standard, other than the 70 loaves daily manufactured by the accused and sold to her customers. The grievance of the plaintiff in error is that by the adoption of the standard loaf the city council deprived her of the right to bake a loaf less than one pound avoirdupois, and that this deprivation was wholly unwarranted, and the power so exercised was unreasonable and arbitrary.

An ordinance fixing manufactured standard loaves of bread at one, two, and four pounds avoirdupois weight, and no other, was held constitutionally valid by the Supreme Court of Michigan. *People v. Wagner*, 86 Mich. 594, 49 N. W. 609, 13 L. R. A. 286, 24 Am. St. Rep. 141.

An ordinance similar to the Toledo ordinance was passed by the city council of Chicago, Ill., permitting the manufacture of one-half pound loaves, as the minimum, and sextuple, or six-pound loaves, as the maximum, weight that could be baked. This ordinance was sustained by the Supreme Court of Illinois in *Chicago v. Schmidinger*, 243 Ill. 167, 90 N. E. 369, 44 L. R. A. (N. S.) 632, 17 Ann. Cas. 614. This case eventually reached the Supreme Court of the United States (*Schmidinger v. Chicago*, 226 U. S. 578, 33 Sup. Ct. 182, 57 L. Ed. 364, Ann. Cas. 1914B, 284), where the judgment of the Illinois court was affirmed. While in the present case the ordinance prescribing the minimum standard loaf is attacked because the same is from four to five ounces heavier than her customers' trade demanded, in the Chicago Case the attack was launched for the reason that the sextuple, or six-pound loaf, was the maximum weight permitted to be made and sold in the city, although there was a considerable demand in some parts of the city for bread in weights different from those prescribed by the ordinance. As stated by Mr. Justice Day in that case: "In some parts of the city bread weighing seven pounds is commonly sold."

Unless there is a clear and palpable abuse of power the court will not substitute its judgment for legislative discretion. The local authorities acquainted with local conditions are presumed to know what the needs of the community demand.

"Local legislative authorities, and not the courts, are primarily the judges of the necessities of local situations calling for police regu-

lation, and the courts can only interfere when such regulation arbitrarily exceeds a reasonable exercise of authority." *Schmidinger v. Chicago*, supra.

In prescribing the standard one-pound loaf as the minimum which could be manufactured and sold by the baker, this court cannot say that the fixing of that standard, in the exercise of legislative discretion by the council, was so unreasonable and arbitrary as to require judicial interference. The ordinance is therefore constitutionally valid, and the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

MATTHIAS, JOHNSON, and WANAMAKER, JJ., concur.

NICHOLS, C. J., and DONAHUE and ROBINSON, JJ., dissent from second proposition of the syllabus and from the judgment.

NOTE—*Police Power in Fixing Weight of Bread.*—It was said in a case in Canada regarding legislation as to weight of bread, that: "The plain object of such legislation, which in one form or another has been upon the statute books for centuries * * * is to protect a purchaser from having fraudulently put off upon him a loaf of less than its proper weight. * * * Driven by stress of competition, greed or dishonesty, there have always been endeavors on the part of some engaged in its manufacture to take advantage of the practical inability of the great majority of purchasers, and those as a rule least able to suffer loss, to know how much they are getting for their money." *Re Bread Sales Act*, 18 Ont. W. Rep. 251. And in one of our States it has been ruled that State police power may as well be exerted in the protection of citizens against false weights, false measures and like methods of imposition by those dealing in articles of food as in those affecting their health and morals. *State v. Huber*, 4 Boyce (27 Del.) 259, 88 Atl. 453.

In *State v. McCool*, 83 Kan. 428, 111 Pac. 477, the Court, after speaking of a bakery being an indispensable institution in cities and towns, of people being constantly compelled to resort to it and of bread being sold by the loaf of a popularly understood size, and therefore some persons "make and deal in bread and by shirking the size of their loaves, or by other devices they cheat the uncritical and unsuspecting public, which relies upon the prevailing customs," said that: "The Legislature found such practices to be sufficiently extensive in this State to need correcting. Therefore every condition essential to a valid exercise of the police power exists."

In *Schmidinger v. Chicago*, 226 U. S. 578, 33 Sup. Ct. 182, 57 L. ed. 364, Ann. Cas. 1914B, 284, it was said: "The making and selling of bread, particularly in a large city where thousands of people depend upon their supply of this necessary of life by purchase from bakers, is obviously one of the trades and callings which may be the subject of police regulation."

In *McLean v. Arkansas*, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. ed. 315, it was declared that laws and ordinances requiring honest weights and

measures in the sale of articles of general consumption have long been considered as lawful exertions of the police power. In Massachusetts and Michigan rulings have sustained ordinances fixing standard sizes of loaves of bread and forbidding the sale of other sizes. *Com. v. McArthur*, 152 Mass. 522, 25 N. E. 836; *People v. Wagner*, 86 Mich. 594, 49 N. W. 609, 13 L. R. A. 286, 24 Am. St. Rep. 141.

In this last cited case it was said that: "The police power of a state is not confined to regulations looking to the preservation of life, health, good order and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objection," and in the sale of bread it is said: "It would be practically impossible to prevent fraud in the sale of short-weight loaves if the matter was left to the ordinary legal remedy afforded the individual consumer for fraud or deceit. The amount involved would not justify a resort to litigation."

But this exercise of the police power has its well defined limitations, when it is to be applied to this kind of selling. It must be aimed at a practice that is or may be prevalent and it must affect a class of the public little able to protect itself. If a business is in an article of public necessity, it seems to me that public health, or public peace and order additionally might be referred to to sustain the exercise of police power. Bread riots and bread lines have been formed in this country and the reasons for them are not alone scarcity of food, but disregard as well of other recognized conditions in the sale of such a necessary of life. As seen, however, the ground upon which courts have proceeded, is alone that of preventing fraud. C.

ITEMS OF PROFESSIONAL INTEREST.

ASSIGNMENT OF INSURANCE TO ONE WITHOUT INSURABLE INTEREST.

We have received a letter from Hon. Gus Thomas, Justice in the Court of Appeals of Kentucky, calling attention to the fact that we omitted a part of his opinion in the case of *Milliken v. Haner*, 212 S. W. 605, which we published in the issue of August 22, 1919, 89 Cent. L. J. 141. The opinion discusses, as its principal question, the assignment of an insurance policy to one who had no insurable interest.

The part of the opinion which we eliminated was that dealing with a question of estoppel.

In most modern opinions many questions of law are discussed which have no relation whatever. In our annotated case it is our purpose to publish only so much of the opinion as bears upon the point of law we desire to discuss in the note. It appears, however, in this case, that one paragraph was eliminated that should have remained—that which discussed some of the reasons given by the court for applying the rule making policies taken out for the benefit of those who have no insurable interest applicable to the case of an assignment to one having no insurable interest. The following is the paragraph which was omitted.

In stating the rule against issuing wagering policies and applying it to the assignment of policies as well as to their original issue, this court, in the *Bayse* case, quoting from Supreme Court of the United States, in the *Warnock* case, said: "Such policies have a tendency to create a desire for the event (the death of the insured). They are, therefore, independently of any statute on the subject, condemned as being against public policy. The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name." And in that case, in answering the contention of counsel in urging the distinction between the assignment of a policy and the original procurement of it, as is also urged by defendant's counsel here, the court said: "Counsel for appellant have cited authorities sustaining the opposite doctrine as respects the assignment of policies of life insurance. But we are unable to see why the rule recognized by all the authorities as applicable to, and which renders invalid, because against public policy, policies of life insurance taken for the benefit of a party having no insurable interest in the life of the person in whose name it is issued, should not be also applied to an assignment of a policy where the assignee has no such insurable interest."

It might be said that nothing is added in this paragraph that was not fully stated by the court in the part of the opinion that we published. It appeared to us then, as it appears to us now, that there was abundant opportunity for the court to be more liberal with respect to the assignment of policies to persons having no insurable interest in the life of the assured. It was for that reason that we criticised its conclusion. We do not believe that the invalidity of insurance policies taken out for the benefit of persons having no insurable interest is, in fact, based on the reason given in the quotation from the *Warnock* case. It is not so much that such policies have a tendency to create a desire for an event—for instance, the death of the insured—as that such a policy is purely a gamble or wager on the life of the insured by

the beneficiary, who pays the premium, and in many cases, takes out the policy. But where the insured himself has taken out the policy and has paid the premiums for a long time, it seems to us that when he becomes old, if his beneficiaries are either dead or do not need the benefits of the policy, that he should be given the right to realize as much as possible on his policy. If the mere tendency of a contract to create a desire for the death of some one else should invalidate every instrument which created such a tendency, then, as Justice Holmes of the United States Supreme Court has shown, all remainders after life estates would be void. But, as Justice Holmes said, "The law of this country shows no prejudice against such remainders." The whole question, therefore, to our mind, should be whether the contract is a wagering policy or a mere speculation on the life of someone else, or whether the policy was taken out bona fide by the insured or by someone who has an insurable interest and afterward assigned for the benefit of the insured or those depending upon him.

RECENT DECISIONS BY THE NEW YORK
COUNTY LAWYERS ASSOCIATION COM-
MITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 175.

Employment; Relation with Third Persons; Relation with Client; Compensation; Contingent Fees—Accepting employment to advise syndicate as to legal liabilities respecting its prospective individual customers, to be used as an argument to secure such customers for the syndicate. Compensation to be contingent upon securing customer. Disapproved.—Compensation to be fixed and not contingent. Not disapproved.—A syndicate engaged in the business of soliciting contracts whereby its customers are to receive indemnity against demands legally enforceable under Revenue Acts, desires to employ an attorney to advise the syndicate as to the probable amount of such demands, under various statutes, against its prospective customers, upon statements of facts procured from them and submitted to the attorney for his opinion, to be rendered to and paid for by the syndicate.

The attorney may be called upon by the syndicate or its prospective customers to eluci-

date his opinion or to confer with the customer's attorneys to check up or verify the computations.

The attorney's compensation in each case is to be contingent upon the customer being procured, and commensurate with the profit to the syndicate, but with a guarantee from the syndicate of a minimum annual amount.

In the opinion of the committee, can the attorney properly accept such employment to be so compensated? If not, can he properly accept it for an agreed compensation not contingent upon such results?

ANSWER No. 175.

Assuming that the business to be carried on by the syndicate is lawful (upon which the committee expresses no opinion), and that the plan is not a cover for the solicitation of business by or for the attorney, the committee sees no impropriety in his accepting such employment; but a majority of the committee is of the opinion that his compensation should not be contingent upon the customer being procured, because the attorney should not engage in a business where he may be tempted by such method of compensation to color his opinions or computations in order to obtain the customer.

QUESTION No. 178.

War; Advertising; Solicitation—Notification of lawyer's return from the war—Not improper.—It is suggested to the committee that it is not only proper but desirable that lawyers, who have been in government service during the emergency of the war, should be able and be urged to send formal notice of their return to professional life to their clients and the persons to whom they might ordinarily send the usual lawyer's announcement of removal of office or the formation of new firms, and the committee's opinion upon the propriety of this course is solicited.

ANSWER.

The committee is of the opinion that the suggestion may be followed without impropriety; but that the adoption of the suggestion should be left to the individual taste or inclination of the lawyer.

CORRESPONDENCE.

SHALL THE JURY BE ABOLISHED?

Editor, Central Law Journal:

The dispute between those who favor the jury system and those against it may be settled, perhaps, by providing for a trial by a judge without a jury in the first instance, followed by an appeal by either party to a trial *de novo* by a jury as a matter of right. Theoretically this suggestion is unsound, but in practice it works.

In this jurisdiction we have a standing Board of Viewers before whom all eminent domain cases must be tried in the first instance with the right of either party to appeal and have a trial by jury. Not 5 per cent of the cases passed on by this board are subsequently tried again.

Some of us still believe that in some cases a trial by jury is the best method yet discovered, but all of us should agree that it is not necessary in every case in the first instance. As a safeguard against the abuse of "judicial discretion" and as a protection for the judiciary itself against the temptation of outsiders to put their own judges on the bench, the jury system is well worth its cost; but as a means of trying the average law-suit, it does not function well and is expensive. Of course, I am not now discussing criminal cases.

Yours truly,

W. J. FITZGERALD.

Scranton, Pa.

FREEDOM OF SPEECH IN TIME OF WAR.

Editor, Central Law Journal:

I have no wish to enter into controversy with Mr. T. J. O'Donnell of Denver, Colorado, because of his communication which appears in the Central Law Journal of the 3rd of October.

I do not think that we disagree about the law as expounded by the courts. But I do disagree with his statement that "Mr. Bromberg professes to view with alarm any power exercised by the President as Commander-in-Chief during time of war" in that article of mine referred to.

In that article, I did not refer to the Branch of Government created by Article I of the Constitution of the United States; I did not refer to the Branch of Government created by Article II of the Constitution of the United States; but I did refer to that Branch of Government

created by Article III of the Constitution of the United States.

To my mind, this country is at the parting of the ways; either we have got to observe the written law at all times, whether the times are those of war or peace so far as the courts are concerned; or, this country has become a country of the despotism of a majority, and that means practically lynch law in time of war.

Whenever an enemy has set foot within the confines of this country, and martial law becomes a necessity, that is the time for the courts not to abdicate their functions, but to recognize the soldier as the superior of the judge, and that even the judge of the Supreme Court is nothing more than the ordinary citizen, subject to martial law, even as a judge.

That, Mr. Editor, is my view of the scope of martial law.

Between martial law, and law enforced by the courts, there is no middle ground. Until martial law is proclaimed in this country, it is the duty of the judges of the courts, under their oaths of office, to exercise their power in accordance with the provisions of section 2, Art. III of the Constitution of the United States, just as if there was no war pending.

The written law, and nothing but the written law in a free country is supreme, until martial law is actually proclaimed.

As soon as martial law is proclaimed, the country ceases to be free *ex necessitate rei*.

Very truly yours,

FREDERICK G. BROMBERG.

Mobile, Ala.

CONSTRUCTION OF LEGAL TENDER ACTS.

Editor, Central Law Journal:

In a very interesting article of Mr. Maynard, in 89 Central Law Journal, 206, 209, upon "Four to Five Decisions of the United States Supreme Court," he says that President Lincoln took "no chances" when he named Judge Strong and Mr. Joseph Bradley as Justices of the Supreme Court, in order to bring about a reversal of the previous decision of that court holding the Legal Tender Act to be unconstitutional. He says the "result" was that the previous decision was reversed in an opinion delivered by Mr. Justice Strong.

I am surprised that a writer apparently so well informed should have lost out so badly upon his historical facts. If Mr. Maynard had looked the matter up, he would have discov-

ered that President Lincoln died in April, 1865; that the decision in 7 Wallace 229, to which he refers, holding the Green Back Act unconstitutional was not made until the 1868 term of the Supreme Court. He would have discovered, further, had he looked at the title page to 9 Wall., or at any of the historical works on the subject, that Mr. Justice Strong and Mr. Justice Bradley were not appointed by President Lincoln. Instead, President Lincoln had been dead about five years before they were appointed, and they were, in fact, appointed in 1870, by President Grant. Of course it follows that President Lincoln was not living when the Green Back Act was first held to be unconstitutional, that he took no steps, by motion or otherwise, to have that decision reconsidered, and that he appointed no Justices to bring about a different decision.

Historical writers, and writers upon Constitutional Law, always have, and probably always will, differ widely as to whether the decision holding the act unconstitutional was the sound decision, or whether the decision holding the act to be constitutional was the sound decision. The decision holding the act to be constitutional was based upon the ground that, in the exercise of its war powers, the Government could, as it did, make paper money legal tender for debts. But it did not hold, as Mr. Maynard fairly implies, that in time of peace the Government had the constitutional power to make paper money legal tender for debt expressly made payable, by contract, in gold coin of a certain weight and fineness. The result today of the first decision rendered is that the payment of debts in time of peace in gold coin of the requisite contract weight and fineness may be properly stipulated for in mortgages, contracts, notes, and contract obligations generally, and there is the strongest reason for believing that all such contract provisions, which are so common, will be enforced by our courts in times of peace.

Not only is this so, but the thinking men of our country are so firmly convinced that the power to make paper money legal tender should not be exercised by the Government except in cases of great extremity, that this Government attempted nothing of the kind in this war, notwithstanding the enormous amounts of money it was required to raise expeditiously, in order to support its allies, as well as to meet its own great expenditures. The reason for sticking to specie payments, even during our war, clearly appears in the enormous depreciation of the paper money of Germany and France, and even Great Britain, at the present time. The policy we pursued, on the other hand, has protected the credit

and resources of this country, and has enormously added to our prestige and business and commercial power among the nations of the world. Many historians have always believed that had we followed the same policy in the Civil War, we would have saved a billion dollars, even in that war, and would also have saved ourselves from green-back, silver and soft money heresies, that cost us enormously, until we had struggled back to honest money, through numerous political campaigns.

Respectfully yours,

ADELBERT MOOT.

Buffalo, N. Y.

HUMOR OF THE LAW.

In early life the diary of a penurious young lawyer read:

- (a) Blue eyes (attached to a girl)
- Dimples (attached to a girl)
- Shapely limbs (attached to a chorus girl)
- Knowledge (of certain sorts)
- Compromising letters
- enable one to secure Money.

Some forty years later after a successful career at the bar, we find these entries made by the same man:

- (b) Money
- enables one to secure
- Blue eyes (attached to a girl)
- Dimples (attached to a girl)
- Shapely limbs (attached to a chorus girl)
- Knowledge (of certain sorts)
- Compromising letters.

When a town in the State of Kentucky went dry The officers emptied the whiskey supply
In a swift little stream, and the fishes therein Partook of the same with a welcoming grin.
Next evening a person named Casey pulled out Of the murmuring waters a sizeable trout,
He ate it that night, and—to make the tale short—

Turned up with a tide in the morning in court.
At least Mr. Casey was free to admit
That this was the way that he chanced to be lit,
But the Judge didn't think that the story was true,

And neither, dear reader, will you!

—J. J. Montague in *St. Louis Post-Dispatch*.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Attorney and Client**—Antagonistic Interests.—An attorney must exercise the highest good faith, and for private reward to himself he cannot abandon the cause of his client as a public officer, without reasonable cause, and undertake employment as private attorney upon litigation antagonistic to the interests of his client.—Stark County v. Mischel, N. D., 173 N. W. 817.

2. **Bailment**—Constructive Possession.—Where the owner of an automobile in possession of a machinist who had repaired it obtained possession by taking it from his shop without his knowledge or consent, and returned it when demanded, and later induced a driver of the machinist, by trick or device, to take it into another garage, which took possession of and attempted to hold it, the machinist did not lose his constructive possession or his lien.—Griffith v. Reddick, Cal., 182 Pac. 984.

3. **Bankruptcy**—Reviewable Order.—Bankruptcy court's order requiring bidder to pay balance of purchase price for bankrupt's property is reviewable by petition to revise, under Bankruptcy Act, § 24 (Comp. St. § 9585), but not by appeal.—In re Reilly, U. S. C. C. A., 258 Fed. 121.

4.—**Schedule**.—Where a bankrupt did not schedule a note held by plaintiff, held, that the discharge in bankruptcy did not bar an action on the note; the creditor not having the notice of the proceedings contemplated by Bankruptcy Act, § 17a (U. S. Comp. St., § 9601).—Lynch v. McKee, Tex., 214 S. W. 484.

5. **Banks and Banking**—Collecting Bank.—Where a cashier's bank check in payment of a deed to land is sent to a bank with instructions to withhold delivery until releases of outstanding liens are secured, but the bank nevertheless

delivers the check to the payee, an action may be maintained against it either in conversion or for money had and received, for the actual loss sustained.—Wegner v. First Nat. Bank, N. D., 173 N. W. 814.

6.—**Collection**.—When a bank undertakes to collect negotiable paper, intrusted to it for that purpose, the relation of principal and agent is thereby established; the bank becoming the agent for collection.—Central Exch. Nat. Bank of Waco v. First Nat. Bank, Tex., 214 S. W. 660.

7.—**Depositor**.—A bank has a lien upon deposits to the extent of all its matured claims against the depositor, and may offset such debts against such deposits.—Block v. Amsden, N. Y., 177 N. Y. S. 604.

8. **Bills and Notes**—Guaranty of Indorsement.—The indorsement on the back of a draft by a bank to which it was forwarded for collection, "Pay any bank or banker, all previous indorsements guaranteed," merely guaranteed the genuineness of the prior indorsements and did not guarantee payment of the draft.—Tradesmen's State Bank v. Ft. Worth Elevators Co., Tex., 214 S. W. 656.

9.—**Negotiable Instrument Law**.—A note, given to be used, with the notes of others, only as collateral to a note of the payee, and which is sold and indorsed by the payee before maturity as an original obligation, is negotiated "in breach of faith" and "under such circumstances as amount to a fraud" within the meaning of the Negotiable Instruments Act.—McWethy v. Norby, Minn., 173 N. W. 803.

10.—**Want of Consideration**.—When accommodation parties get for and through another the exact consideration which they contemplate, it is the same as if they receive it for themselves and a plea of want of consideration is not good.—Watkins v. Woodbery, Ga., 100 S. E. 34.

11.—**Without Recourse**.—An indorser "without recourse in any way" is liable to bona fide holder of note executed by husband and wife, and taken on strength of wife's signature, which was a forgery, the indorser warranting the genuineness of her signature.—Miller v. Stewart, Tex., 214 S. W. 565.

12. **Boundaries**—Course and Distance.—A call for a natural object will not control a call for course and distance, when it appears that the same was made by mistake, or upon an erroneous conjecture.—Benavides v. State, Tex., 214 S. W. 568.

13. **Carriers of Goods**—Long and Short Haul.—A shipper's agreement to allow a carrier to charge rates conflicting with Const. art. 13, § 12, prohibiting charging more for short than long hauls, does not estop him from later contesting the legality of such rates.—Missouri Southern R. Co. v. Public Service Commission, Mo., 214 S. W. 379.

14. **Carriers of Live Stock**—Negligence.—In action for injuries to a shipment of cattle while in transit, the burden is upon plaintiffs to show that they were negligently handled en route, where one representing plaintiffs accompanied the cattle throughout the entire trip.—Galveston, H. & S. A. Ry. Co. v. Crowley, Tex., 214 S. W. 721.

15. **Charities**—Voluntary Association.—One who establishes a charitable trust may entrust its administration to a corporation, or to a voluntary association.—*Roberts v. Corson*, N. H., 107 Atl. 625.

16. **Commerce**—Bridges.—The states have power to grant charters to and regulate toll charges on bridges between states, where Congress has not seen fit to act regarding the same.—*Proprietors of Cornish Bridge v. Fitts*, N. H., 107 Atl. 626.

17. **Contracts**—Dissatisfaction.—Where defendant engaged plaintiff to make vocal phonograph records, defendant to pay her a stipulated sum for every record which it declared satisfactory, held that, where defendant declared most of the records unsatisfactory, the burden was on plaintiff to show that defendant's dissatisfaction was feigned; and where defendant acted in good faith, and was willing to allow plaintiff another opportunity to make satisfactory records, there can be no recovery.—*Lyon v. Starr Piano Co.*, N. Y., 177 N. Y. S. 682.

18.—**Mutuality**.—A contract of employment, containing no reciprocal covenants by the employer, nor any promise of employment, held void for want of mutuality.—*Clark Paper & Mfg. Co. v. Stenacher*, N. Y., 177 N. Y. S. 614.

19. **Corporations**—Minority Stockholders.—In a suit by minority stockholders who were denied access to the corporate books, an order providing that they should be allowed access to the books is sufficient in the first instance, and the books of the corporation should not be ordered by mandatory injunction to be deposited in court for inspection of the parties.—*Monte Rico Min. & Mill Co. v. Fleming*, U. S. C. C. A., 258 Fed. 106.

20. **Criminal Law**—Accessory Before the Fact.—One does not become an accessory before the fact by the mere approval of a crime, but enough must be shown to justify the inference that the offender has counseled or induced or encouraged the crime, in view of Penal Law, § 2.—*People v. Doyle*, N. Y., 177 N. Y. S. 641.

21.—**Circumstantial Evidence**.—If all possible hypotheses arising from the circumstantial evidence favorable to defendant are presented in a complete statement to the jury, and they are told that if they believe any one hypothesis they should acquit, the law of circumstantial evidence is sufficiently presented.—*Davis v. State*, Ga., 100 S. E. 50.

22.—**Estoppel**.—The state is not bound in a criminal case by the testimony of one of its witnesses, and a prosecuting attorney may ask the jury to infer that a certain witness for the state did not tell the truth.—*People v. Minsky*, N. Y., 124 N. E. 126, 227 N. Y. 94.

23.—**General Verdict**.—Where an indictment charges robbery by force and robbery by intimidation, a general verdict of guilty will be construed as a verdict finding defendant guilty of the graver offense, robbery by force.—*Tanner v. State*, Ga., 100 S. E. 44.

24.—**Impeachment**.—Newly discovered evidence, merely impeaching in character, does not constitute sufficient cause for new trial.—*Cauthen v. State*, Ga., 100 S. E. 39.

25.—**Intent**.—The controlling intent in a criminal action is the intent of defendant and not of those with whom he dealt.—*People v. Wholey*, N. Y., 177 N. Y. S. 685.

26. **Damages**—Prospective Profits.—Prospective profits may be recovered as damages for breach of contract, if they can be proven with reasonable certainty, but remote and speculative damages cannot be recovered.—*Bromley v. Heffernan Engine Works*, Wash., 182 Pac. 929.

27. **Deeds**—Ambiguity.—If the language of an instrument be uncertain and ambiguous, it is to be taken by its four corners and read in the light of the circumstances surrounding its execution and the situation of the parties.—*Muzio v. Erickson*, Cal., 182 Pac. 974.

28. **Divorce**—Separation.—Conduct and language causing great mental suffering, and which is persisted in, may be the basis of a separation, and there need not be physical violence, or the threat of it, to constitute cruel and inhuman treatment.—*Morris v. Morris*, N. Y., 177 N. Y. S. 600.

29. **Domicile**—Establishing.—A man's domicile or residence of choice, once established, is presumptively retained until it is affirmatively shown that he has either abandoned or changed it.—*In re Seymour*, N. Y., 177 N. Y. S. 702.

30. **Dower**—Survivorship.—The right of a possessor of the right of inchoate dower is wholly dependent on survivorship as to any or all property, real or personal.—*Long v. Long*, Ohio, 124 N. E. 161.

31. **Eminent Domain**—Market Value.—In a proceeding to condemn strips of land for a highway, measure of damages is the fair market value of land actually taken, together with the depreciation, if any, of the owner's land caused by the taking, or, in other words, the difference between the market value of the land immediately before and after the appropriation, less any such sums as the land will be actually enhanced in value by the construction of the road.—*State v. Kelley*, Wash., 182 Pac. 942.

32. **Estoppel**—Criminal Law.—The doctrine of estoppel does not apply to the people in a criminal action.—*People v. Wholey*, N. Y., 177 N. Y. S. 685.

33. **Fraud**—Damages.—The subscriber to corporate stock, induced thereto by false representations of the directors of the company, could recover only indemnity for the actual pecuniary loss sustained as a direct result of the wrong, that is, the difference between the amount he paid and the value of the stock which he received, with interest.—*Reno v. Bull*, N. Y., 124 N. E. 144, 226 N. Y. 546.

34. **Fraudulent Conveyances**—Secret Agreements.—Secret agreements between husband and wife, under which it is claimed that the husband carried on the business of erecting and selling houses for the wife, while at the same time he conducted the same business for himself, will be viewed with suspicion by a court of equity.—*Marcy v. French*, N. Y., 177 N. Y. S. 602.

35. **Highways**—Nuisance.—A suit for relief from a public nuisance, such as the proposed construction of the public highways of the county, cannot be maintained by individuals alone, suing as such, unless they can show some spe-

cial injury to them which is not suffered by the public at large.—*Boone v. Clark*, Tex., 214 S. W. 607.

36. **Homicide—Dying Declarations.**—Dying declarations are statements of material facts concerning the cause and circumstance of the homicide, and are restricted to the act of killing and to the circumstances attending it, and form part of the *res gestae*.—*State v. Swartz*, Wash., 182 Pac. 953.

37. **Husband and Wife—Community Property.**—Suit on a policy of insurance issued to a wife covering household goods constituting the community property of the wife and her husband was properly brought in the name of the husband.—*Allemania Fire Ins. Co. v. Angier*, Tex., 214 S. W. 450.

38. **Joint Tort-feasors.**—In an action for damages for alienation of affections, the question whether or not a conspiracy exists between several defendants is immaterial, because the several defendants are liable as joint tort-feasors, if the sum total of their acts constituted the offense.—*Smith v. Smith*, S. D., 173 N. W. 843.

39. **Tenant at Will.**—Where a husband cultivated a tract owned by his wife in connection with an adjoining plot of his own, and received the entire proceeds of both pieces, he was a tenant at will.—*Baumann v. City of New York*, N. Y., 124 N. E. 141, 227 N. Y. 25.

40. **Indemnity—Active Tort-feasor.**—Where a defendant railroad company was an active tort-feasor guilty of affirmative negligence causing the death of an employee of another company also charged with negligence, the railroad company is not entitled to recover over against the other company.—*Rio Grande, E. P. & S. F. R. Co. v. Guzman*, Tex., 214 S. W. 628.

41. **Injunction—Negative Covenant.**—Since justice and equity, as between the parties to a suit to enjoin breach of negative covenant in a contract of employment, is the object to be sought, the courts will not stretch a point to sustain an onerous contract that is one-sided upon its face.—*Clark Paper & Mfg. Co. v. Stenacher*, N. Y., 177 N. Y. 514.

42. **Office of.**—The office of a preliminary injunction is to preserve the status quo until, on the final hearing, the court may grant full relief.—*Root v. Conkling*, N. Y., 177 N. Y. S. 610.

43. **Insane Persons—Guardian Ad Litem.**—The guardian ad litem representing an insane defendant should make no admissions against the interest of defendant, but should require that proper legal proof be made of the facts entitling plaintiff to the relief which he seeks.—*Knight v. Waggoner*, Tex., 214 S. W. 690.

44. **Insurance—Insurable Interest.**—A complaint on fraternal benefit policy need not allege that beneficiary had an insurable interest in the insured's life, since the lack of such interest is a matter of defense.—*Hand v. Sovereign Camp, Woodmen of the World*, Tex., 214 S. W. 718.

45. **New Policy.**—If insurer issued policy with knowledge that agent had represented that premiums paid on a canceled policy would be credited on the new policy, it would be bound by such representation.—*Northwestern Nat. Life Ins. Co. v. Evans*, Tex., 214 S. W. 598.

46. **Judgment—Collateral Attack.**—Collateral attack on a judgment for insufficiency of the pleadings cannot be sustained, even though the judgment granted more relief than was demanded, which did not render it void.—*Conner v. McAfee*, Tex., 214 S. W. 646.

47. **Satisfaction.**—Satisfaction of judgment against one joint tort-feasor operates as a release of judgment recovered against another joint tort-feasor as to interest as well as to principal.—*Larson v. Anderson*, Wash., 182 Pac. 957.

48. **Landlord and Tenant—Abandonment.**—Landlords were authorized to take possession of premises upon abandonment thereof by tenants.—*Alsbury v. Linville*, Tex., 214 S. W. 492.

49. **Relation Between.**—Relation of landlord and tenant can be created impliedly as well as by express agreement.—*Williamson v. Hallett*, Wash., 182 Pac. 940.

50. **Reversion.**—The right to recover for permanent injuries to the reversion is vested in the landlord.—*Baumann v. City of New York*, N. Y., 124 N. E. 141, 227 N. Y. 25.

51. **Larceny—Subsequent Appropriation.**—If possession is obtained by bailee by trick, device or fraud, with intent to appropriate the property to his own use, and the owner or custodian intends to part with possession only, the bailee commits larceny if he subsequently appropriates the property.—*Sykes v. State*, Fla., 82 So. 778.

52. **Limitation of Actions—Commencement of Suit.**—Commencement of suit to recover land stops the running of limitations in favor of defendant as against the interest of one who intervenes therein under a power of attorney given by plaintiff to prosecute such suit, coupled with an interest in the land, since a judgment would be binding upon the intervenor as well as the plaintiff.—*Bryan v. Ross*, Tex., 214 S. W. 524.

53. **Discovery of Fraud.**—The rule requiring diligence to discover fraud does not apply where a father defrauded his child, in which case the child can rely on the parent's representations until facts showing fraud come to knowledge.—*Dean v. Dean*, Tex., 214 S. W. 505.

54. **Personal Plea.**—Limitation statutes are waived, if not pleaded.—*Garza v. City of San Antonio*, Tex., 214 S. W. 488.

55. **Running Account.**—Where plaintiff claimed she rendered services to defendant's estate under an express contract for a specified monthly compensation, and more than three years elapsed between the date payment became due and the bringing of action, the claim is barred by Code of Laws 1901, § 1265, prescribing a three-year limitation period for actions on express or implied contracts, etc.—*McCurley v. National Savings & Trust Co.*, D. C., 258 Fed. 154.

56. **Master and Servant—Contributory Negligence.**—That an electric lineman, killed by contact with a live wire, failed to wear rubber gloves provided for him did not make him guilty of contributory negligence, where the regulations did not require him to wear such gloves while doing the work upon which he was engaged when injured.—*Washburn v. Laclede Gas Light Co.*, Mo., 214 S. W. 410.

57. **Safe Place.**—It is immaterial to the negligence of a building contractor whether a scaffold erected for workmen was unsafe through faulty or unsuitable material or in its construction, where a workman was injured from its defective condition.—*Reilly v. Reilly*, Pa., 107 Atl. 633.

58. **Mortgages—Future Indebtedness.**—A mortgage to secure future indebtedness is valid.—*Poole v. Cage*, Tex., 214 S. W. 500.

59. **Municipal Corporations—Fee in Street.**—The owner of the fee in a street has the right to use the subsurface in front of his property, so long as he does not interfere with the rights of the municipality below the surface for sewers, water, gas, or other proper purposes.—*S. H. Kress & Co. v. City of Miami*, Fla., 82 So. 775.

60. **Ordinance.**—If a municipal ordinance directly affecting the rights of individuals is arbitrary and unreasonable, it is invalid, and

will not be enforced.—*Cary v. Ellis*, Fla., 82 So. 781.

61.—**Street Obstruction.**—A contractor who rightfully enters upon a highway for the purpose of improving a street has a right to barricade and obstruct the public travel over the section of the street being improved.—*Davis v. Mellen*, Utah, 182 Pac. 920.

62.—**Negligence—Foreseeing Injury.**—The liability of person charged with negligence does not depend on the question whether, with the exercise of reasonable prudence, he could or ought to have foreseen the injury complained of, but he may be held liable for anything which, after the injury is complete, appears to have been a natural and probable consequence of his act or omission.—*Washburn v. Laclede Gas Light Co.*, Mo., 214 S. W. 410.

63.—**Imputability.**—Negligence of driver of a conveyance is not imputable to an occupant who has no control over, and gives no directions to, the driver.—*Chicago, R. I. & G. Ry. Co. v. Wentzel*, Tex., 214 S. W. 710.

64.—**Proximate Cause.**—An instruction defining proximate cause as not necessarily the cause nearest in time or physical sequence, but a cause without which the injury would not have happened, and from which the injury or a like injury might reasonably have been anticipated, is substantially correct.—*Galveston, H. & S. A. Ry. Co. v. Cook*, Tex., 214 S. W. 539.

65.—**Nuisance—Lawful Business.**—A landowner may be liable for maintaining a nuisance by reason of his mode of carrying on a lawful business, even though the annoyances complained of are ordinary incidents of such a business when properly conducted.—*Brede v. Minnesota Crushed Stone Co.*, Minn., 173 N. W. 805.

66.—**Partition—Restrictive Covenant.**—The purchaser at a partition sale cannot avoid his bid because of restrictive covenants prohibiting the property's use for slaughter house purposes, etc., where there is no claim that such restrictions depreciated the property's value.—*Noethlinger v. Jeffries*, N. Y., 177 N. Y. S. 577.

67.—**Patents—Infringement.**—Infringement of a patented device cannot be avoided by merely improving it.—*Otto Coking Co. v. Koppers Co.*, U. S. C. C. A., 258 Fed. 122.

68.—**Payment—Voluntary.**—A party cannot by direct action, or by way of set-off or counterclaim, recover money voluntarily paid with a full knowledge of all the facts and without any fraud, duress, or extortion, although no obligation to make such payment existed.—*Hunt County v. Greer*, Tex., 214 S. W. 605.

69.—**Perpetuities—Rule Against.**—A will which does not provide for vesting the fee during the life or lives of a person or persons in being or within 21 years and 10 months thereafter is void under the rule against perpetuities.—*Neely v. Brogdon*, Tex., 214 S. W. 614.

70.—**Principal and Agent—Revocability.**—Where a client by contract employs an attorney to recover lands and remove clouds therefrom, and executes a power of attorney to the attorney to sue for and recover such lands, and assigns a two-thirds undivided interest in the recovery as compensation, the contract was intended as security, and the power is not revocable after a partial performance by the attorney.—*Bryan v. Ross*, Tex., 214 S. W. 524.

71.—**Transcending Powers.**—It is the general rule that one dealing with an agent must ascertain the powers delegated to him, and must abide by the consequences if he transcends them.—*Bonwit Teller & Co. v. Hosford*, N. Y., 177 N. Y. S. 686.

72.—**Quietting Title—Burden of Proof.**—In action to declare a trust and quiet title, plaintiff must establish her position, if at all, upon the strength of her own case rather than the weakness of the defense.—*Roberts v. Allen*, Cal., 182 Pac. 983.

73.—**Railroads—Track Crossing.**—The contributory negligence of one injured while crossing a track along which he is walking is to be determined without reference to any negligence of the railroad.—*Wing v. Western Pac. R. Co.*, Cal., 182 Pac. 969.

74.—**Reformation of Instruments—Fraud, Accident and Mistake.**—Where by accident, mis-

take, or fraud a writing does not speak the truth, it may be reformed and corrected and be made to speak the truth.—*Roy v. Georgia R. & Banking Co.*, Ga., 100 S. E. 46.

75.—**Release—Breach of Marriage Promise.**—Where a release is relied on in an action for breach of marriage promise, it must be pleaded as an affirmative defense.—*Bundy v. Dickinson*, Wash., 182 Pac. 947.

76.—**Robbery—Actual Force.**—"Actual force," in the definition of robbery, implies personal violence, and if there is any injury to the person or any struggle to obtain possession of property before it is taken, it is the force contemplated by the Penal Code.—*Tanner v. State*, Ga., 100 S. E. 44.

77.—**Sales—Acceptance.**—Retention of possession without any claim indicating that the buyer had any fault to find with the goods held sufficient to justify instruction that retention under the circumstances amounted to an acceptance.—*Brown Bag Filling Mach. Co. v. United Smelting & Aluminum Co.*, Conn., 107 Atl. 619.

78.—**Rejection.**—A seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity or to require him to select part of a greater quantity, so, where a seller agreed to deliver 1,000 barrels of flour according to sample, but part of the flour delivered was damaged, the buyer may refuse to accept the undamaged portion.—*El Paso Grain & Milling Co. v. Lawrence*, Tex., 214 S. W. 512.

79.—**Statutes—Ejusdem Generis.**—Under the rule ejusdem generis, where general words follow the enumeration of particular classes of business, the general words will be construed as applicable only to the business of the same general character or class as those enumerated.—*Board of Com'rs of Kingfisher County v. Grimes*, Okla., 182 Pac. 897.

80.—**Street Railroads—Right of Way.**—Ordinarily street cars which run upon rigid rails have a better right to the space the rails occupy, to which pedestrians must give way.—*Badger v. City and County of San Francisco*, Cal., 182 Pac. 978.

81.—**Telegraphs and Telephones—Limiting Liability.**—A telegraph company cannot, by contract, limit its liability as to the amount of damage in a case of gross negligence.—*Pierce Co. v. Western Union Telegraph Co.*, N. Y., 177 N. Y. S. 598.

82.—**Vendor and Purchaser—Constructive Notice.**—One purchasing land is not bound by a trust agreement between his grantor and a third person, where he has neither actual nor constructive notice thereof.—*Johnson v. Marti*, Tex., 214 S. W. 726.

83.—**Warehousemen—Special Contract.**—A warehouseman, in the absence of a special contract to the contrary, is liable directly to the owner, where goods are stored with him by a common carrier as unclaimed freight, where he delivers the wrong goods by mistake.—*Strong v. Security Storage & Warehouse Co.*, N. Y., 177 N. Y. S. 591.

84.—**Waters and Water Courses—Riparian Owner.**—The general rule is that the right of a riparian owner to the use of the waters of a navigable stream for domestic purposes is superior to the right of a similar owner to use them for irrigation.—*Grogan v. City of Brownwood*, Tex., 214 S. W. 532.

85.—**Wills—Publication.**—Publication of a will is accomplished if the acts done and the words spoken convey to the minds of the witnesses an understanding on the part of the testator of the character of the paper executed.—*In re Winne's Will*, N. Y., 177 N. Y. S. 699.

86.—**Undue Influence.**—Undue influence, to vitiate will, need not consist of overt acts of undue influence exercised at time of execution; influence exercised previously to and operating at time of execution being sufficient.—*Rounds v. Coleman*, Tex., 214 S. W. 496.

87.—**Witnesses—Accused as Witness.**—On a murder trial, where defendant elects to testify in his own behalf, he may be cross-examined as to admissions voluntarily made that he committed the homicide.—*Buck v. State*, Okla., 182 Pac. 913.